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10 Attorneys for Defendant
11 UNUM LIFE INSURANCE COMPANY
12 OF AMERICA

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 JEFFREY SIMON

16 Plaintiff,

17 vs.

18 UNUM LIFE INSURANCE COMPANY OF
19 AMERICA and THE LIPMAN COMPANY,
20 INC. LONG TERM DISABILITY PLAN

21 Defendants

) Case No.: C07-2213 WDB
)
)

) **DEFENDANT UNUM LIFE INSURANCE**
) **COMPANY OF AMERICA'S ANSWER**
) **TO PLAINTIFF'S FIRST AMENDED**
) **COMPLAINT**

1 Comes now Defendant Unum Life Insurance Company of America (“Unum”) answers
2 the complaint (“complaint”) filed by plaintiff Jeffrey Simon ("plaintiff") in this action as follows:

3 **PRELIMINARY ALLEGATIONS**

4 1. Answering the allegations of paragraph 1 of the complaint, Unum admits this
5 action concerns a group disability insurance policy and is governed under ERISA. Unum denies
6 the remaining allegations of paragraph 1.

7 2. Answering the allegations of paragraph 2 of the complaint, Unum is without
8 information or belief to answer said allegations and based thereon denies said allegations.

9 3. Answering the allegations of paragraph 3 of the complaint, Unum admits the
10 allegations.

11 4. Answering the allegations of paragraph 4 of the complaint, Unum is without
12 information or belief to answer the allegations related to plaintiff’s status as a participant under
13 the Plan and based thereon denies said allegations. As to the remaining allegations of said
14 paragraph 4, Unum admits this court has jurisdiction and that venue is proper in this district.

15 **FIRST CAUSE OF ACTION**

16 5. Answering the allegations of paragraph 5 of the complaint, Unum denies that
17 plaintiff suffered a disability as defined by the Plan; Unum is without information or belief to
18 answer the remaining allegations of said paragraph and based thereon, denies said allegations.

19 6. Answering the allegations of paragraph 6 of the complaint, Unum is without
20 information or believe to answer said allegations and based thereon, denies said allegations.

21 7. Answering the allegations of paragraph 7 of the complaint, Unum denies that it
22 “erroneously and wrongfully continued to uphold its prior determination denying plaintiff’s
23 claim for LTD benefits past June 2002”; Unum admits the remaining allegations of said
24 paragraph 7.

25 8. Answering the allegations of paragraph 8 of the complaint, Unum denies each and
26 every allegation contained in said paragraph, including sub-paragraphs (a) through (f) inclusive.

27 9. Answering the allegations of paragraph 9 of the complaint, Unum denies the
28 allegations.

1 10. Answering the allegations of paragraph 10 of the complaint, Unum denies the
2 allegations.

3 11. Answering the allegations of paragraph 11 of the complaint, Unum denies the
4 allegations.

5 12. Answering the allegations of paragraph 12 of the complaint, Unum denies the
6 allegations.

7 **SECOND CAUSE OF ACTION**

8 13. Answering the allegations of paragraph 13 of the complaint, Unum incorporates
9 by reference its responses to paragraphs 1-12 as though fully set forth herein.

10 14. Answering the allegations of paragraph 14 of the complaint, Unum denies the
11 allegations.

12 **THIRD CAUSE OF ACTION**

13 15. Answering the allegations of paragraph 15 of the complaint, Unum incorporates
14 by reference its responses to paragraphs 1-14 as though fully set forth herein.

15 16. Answering the allegations of paragraph 16 of the complaint, Unum denies the
16 allegations.

17 **AFFIRMATIVE DEFENSES**

18 **FIRST AFFIRMATIVE DEFENSE**

19 17. As a first affirmative defense, Unum alleges that neither plaintiff's complaint nor
20 any claim for relief therein state facts sufficient to constitute a claim for relief against Unum.
21

22 **SECOND AFFIRMATIVE DEFENSE**

23 18. As a second affirmative defense, Unum alleges, on information and belief, that
24 through plaintiff's conduct, to be determined by the court as comparative or contributory fault,
25 plaintiff has waived and relinquished, or is estopped to assert, every claim for relief asserted in
26 his complaint.

THIRD AFFIRMATIVE DEFENSE

19. As a third affirmative defense, Unum alleges, on information and belief, that any damages sustained by plaintiff by reason of the events alleged in his complaint were proximately caused or contributed to by plaintiff's conduct, to be determined by the court.

FOURTH AFFIRMATIVE DEFENSE

20. As a fourth affirmative defense, Unum alleges, on information and belief, that plaintiff's damages and/or policy benefits, to be determined by the court, are subject to reduction and/or elimination pursuant to offset and/or policy limitations.

FIFTH AFFIRMATIVE DEFENSE

21. As a fifth affirmative defense, Unum alleges that plaintiff has failed to satisfy all conditions precedent to receipt of benefits under the policy.

SIXTH AFFIRMATIVE DEFENSE

22. As a sixth affirmative defense, Unum alleges, on information and belief, that plaintiff, as to be determined by the court, is barred and estopped by the equitable doctrine of unclean hands from seeking or obtaining any recovery against Unum by reason of his complaint.

SEVENTH AFFIRMATIVE DEFENSE

23. As a seventh affirmative defense, Unum denies that plaintiff has sustained any injury or damage by any act or omission by Unum. However, if it is established that plaintiff suffered an injury or damage for which Unum is held liable, Unum alleges that such injury or damage is to be determined by the court as proximately caused or contributed to by the intervening negligence or wrongful acts of plaintiff, or others acting for or on his behalf and that those negligent and/or wrongful acts by plaintiff or others, eliminate and/or reduce any damages plaintiff can recover from Unum in this action.

EIGHTH AFFIRMATIVE DEFENSE

24. As an eighth affirmative defense, Unum alleges that any and all losses or damages sustained by plaintiff, as a result of the occurrences alleged in the complaint, are to be determined by the court as proximately caused in whole or in part by the negligence or fault of persons or entities other than Unum, and for whom Unum is not responsible. The negligence and

1 fault of other persons or entities eliminates or reduces any damages plaintiff may recover from
2 Unum in this action.

3 **NINTH AFFIRMATIVE DEFENSE**

4 25. As a ninth affirmative defense, Unum alleges that plaintiff, as to be determined by
5 the court, failed to exercise reasonable care and diligence to mitigate his damages, if he has any.
6 As a consequence, plaintiff's claim should be barred, or alternatively, any damages awarded to
7 plaintiff should be reduced in proportion to plaintiff's fault in failing to mitigate his damages.

8 **TENTH AFFIRMATIVE DEFENSE**

9 26. As a tenth affirmative defense, Unum alleges that plaintiff's claims for relief, as to
10 be determined by the court, are barred by the principle of unjust enrichment.

11 **ELEVENTH AFFIRMATIVE DEFENSE**

12 27. As an eleventh affirmative defense, Unum alleges that each and every act or
13 statement done or made by Unum, or by Unum's agents or employees, with reference to plaintiff,
14 before and after plaintiff filed his original complaint, was privileged as a good faith assertion of
15 Unum's legal and contractual rights.

16 **TWELFTH AFFIRMATIVE DEFENSE**

17 28. As a twelfth affirmative defense, Unum alleges that plaintiff is not entitled to any
18 further benefits or any other compensation from Defendants.

19 **THIRTEENTH AFFIRMATIVE DEFENSE**

20 29. As a thirteenth affirmative defense , Unum alleges that pursuant to the provisions
21 set forth in the Group Policy and Plan document Unum was vested with discretionary authority
22 to determine eligibility for benefits and to interpret the terms and provisions of the Group Policy.
23 Unum's claim decision is properly reviewed by the court under an arbitrary and capricious
24 standard of review. Unum's claim decision was not arbitrary and capricious.

25 **FOURTEENTH AFFIRMATIVE DEFENSE**

26 30. As a fourteenth affirmative defense, Unum alleges that plaintiff's claims for relief
27 are barred by the parol evidence rule, to the extent that such rule has been made a part of the
28 federal common law of ERISA.

FIFTEENTH AFFIRMATIVE DEFENSE

31. As a fifteenth affirmative defense, Unum alleges that plaintiff's complaint is barred by the applicable statutes of limitations.

SIXTEENTH AFFIRMATIVE DEFENSE

32. As a sixteenth affirmative defense, Unum alleges that plaintiff does not have standing to bring this action pursuant to a claim decision under the Regulatory Settlement Agreement.

SEVENTEENTH AFFIRMATIVE DEFENSE

33. As a seventeenth affirmative defense, Unum alleges that plaintiff does not have standing to bring this action pursuant to a claim decision under the California Settlement Agreement.

EIGHTEENTH AFFIRMATIVE DEFENSE

34. As an eighteenth affirmative defense, Unum alleges that its claim decision was correct and proper under the terms of the Plan and/or Group Policy

NINETEENTH AFFIRMATIVE DEFENSE

35. As a nineteenth affirmative defense, Unum alleges that plaintiff, by virtue of the legal doctrines of waiver and laches, as to be determined by the court, is estopped from pursuing some or all of the claims alleged against Unum.

TWENTIETH AFFIRMATIVE DEFENSE

36. As a twentieth affirmative defense, Unum alleges that plaintiff is not entitled to, attorneys' fees, or damages in the amount of future benefits pursuant to any of the claims for relief alleged in his complaint.

TWENTY-FIRST AFFIRMATIVE DEFENSE

37. As a twenty-first affirmative defense, Unum alleges that plaintiff's damage claim, if any, is limited by the provisions of Insurance Code Section 10111.

TWENTY-SECOND AFFIRMATIVE DEFENSE

38. As a twenty-second affirmative defense, Unum alleges that plaintiff's remedy for any alleged breach of contract is limited by California Civil Code Sections 3300 and 3302.

TWENTY-THIRD AFFIRMATIVE DEFENSE

39. As a twenty-third affirmative defense, Unum reserves its right to assert additional defenses based on information gathered in the course of additional investigation and discovery.

PRAYER FOR RELIEF

WHEREFORE, Unum prays for judgment to be determined by the court/jury in its favor as follows:

1. That plaintiff take nothing by reason of his complaint on file herein;
2. That Unum be awarded its costs and expenses incurred in this action;
3. That Unum be awarded its attorneys' fees incurred in this action; and
4. That Unum recover such other and further relief as the Court may deem just and proper.

KELLY, HERLIHY & KLEIN LLP

Dated: August 21, 2007

By _____/s/_____

John C. Ferry
Attorneys for Defendant
UNUM LIFE INSURANCE
COMPANY OF AMERICA

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